

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ALICIA B.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

CASE NO. 3:23-CV-5514-DWC

ORDER REVERSING AND
REMANDING DEFENDANT’S
DECISION TO DENY BENEFITS

Plaintiff filed this action under 42 U.S.C. § 405(g) seeking judicial review of Defendant’s denial of her application for disability insurance benefits (“DIB”).¹ After considering the record, the Court concludes the Administrative Law Judge (“ALJ”) erred in his evaluation of certain medical opinion evidence. Had the ALJ properly considered the evidence, he may have reached a different disability determination or included additional limitations in Plaintiff’s residual functional capacity (“RFC”). The ALJ’s error is, therefore, not harmless, and this matter is

¹ Pursuant to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73, and Local Rule MJR 13, the parties have consented to have this matter heard by the undersigned Magistrate Judge. *See* Dkt. 3.

ORDER REVERSING AND REMANDING
DEFENDANT’S DECISION TO DENY BENEFITS

1 reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g) to the Commissioner of
2 Social Security (“Commissioner”) for further proceedings consistent with this order.

3 **I. Factual and Procedural History**

4 Plaintiff filed a claim for DIB in October 2017, alleging disability beginning June 27,
5 2017. Dkt. 11, Administrative Record (“AR”) 209. Her application was denied at the initial level
6 and on reconsideration. AR 96–97. She requested a hearing before an ALJ, which took place on
7 February 13, 2020. AR 33–82, 132–33. Plaintiff was represented by counsel at the hearing. *See*
8 AR 33. The ALJ issued an unfavorable decision denying benefits, and the Appeals Council
9 denied Plaintiff’s request for review. AR 1–6, 15–28. Plaintiff appealed to this Court, which
10 reversed the Commissioner’s decision and remanded the case for further proceedings. *See* AR
11 2791–96; *Alicia B. v. Comm’r of Soc. Sec.*, No. C20-6187-BAT, 2021 WL 2948530 (W.D.
12 Wash. July 14, 2021).

13 In November 2020, while Plaintiff’s appeal was pending, she filed a separate claim for
14 DIB. AR 2882–86. After this Court reversed and remanded the Commissioner’s decision on
15 Plaintiff’s October 2017 DIB claim, the Appeals Council issued an order vacating the decision,
16 remanding the case to an ALJ for further proceedings, and directing the ALJ to consolidate the
17 remanded case with Plaintiff’s November 2020 DIB claim. AR 2804–05.

18 On February 2, 2023, Plaintiff appeared before the same ALJ for another hearing. AR
19 2708–44. The ALJ issued an unfavorable decision denying benefits on April 5, 2023. AR 2679–
20 2707. Plaintiff appealed to this Court. *See* Dkts. 1, 5.

21 **II. Standard of Review**

22 When reviewing the Commissioner’s final decision under 42 U.S.C. § 405(g), this Court
23 may set aside the denial of social security benefits if the ALJ’s findings are based on legal error
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or are not supported by substantial evidence in the record. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (citing *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1153 (2019) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). “We review only the reasons provided by the ALJ in the disability determination and may not affirm the ALJ on a ground upon which he did not rely.” *Garrison v. Colvin*, 759 F.3d 995, 1010 (9th Cir. 2014).

“[H]armless error principles apply in the Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012), *superseded on other grounds by* 20 C.F.R. § 404.1502(a). Generally, an error is harmless if it is not prejudicial to the claimant and is “inconsequential to the ultimate nondisability determination.” *Stout v. Comm’r, Soc. Sec. Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *see also Molina*, 674 F.3d at 1115.

III. Discussion

Plaintiff contends the ALJ harmfully erred by (1) failing to comply with the Appeals Council’s remand order, (2) improperly considering Plaintiff’s skin cyst impairment at Steps Two and Three, (3) improperly evaluating medical opinion evidence, (4) improperly discounting Plaintiff’s subjective symptom allegations, and (5) improperly addressing lay witness statements. Dkt. 13 at 1.

A. Compliance with Remand Order

Plaintiff first claims the ALJ erred by failing to consolidate the remanded claim with Plaintiff’s November 2020 DIB claim, as directed by the Appeals Council in its remand order. *Id.* at 2. Plaintiff argues that, “[a]lthough the ALJ acknowledged the Remand Order’s directives in the decision, he did not consolidate the claims” because he “issued an unfavorable decision

1 without referencing the subsequent November 2020 disability claim[.]” *Id.* at 3. Therefore,
2 Plaintiff contends, her November 2020 disability claim “has not been adjudicated and the record
3 is unclear as to the status of this claim.” *Id.*

4 In his April 2023 decision, the ALJ cited to the Appeals Council’s remand order and
5 referenced its directives regarding certain evidence. AR 2682 (citing AR 2804). The
6 administrative record before the ALJ contained documents related to Plaintiff’s November 2020
7 DIB claim, including the application (AR 2882–86), the initial denial (AR 2775–86), the order
8 transferring the request for reconsideration (AR 2797–2801), disability reports dated February
9 2021 (AR 2960–63, 2985–94), and Plaintiff’s function reports dated April 2021 (AR 2969–84).
10 In his summary of the evidence in the record, the ALJ cited these function reports, which were
11 associated with Plaintiff’s November 2020 claim, as well as medical records and opinions
12 obtained after the October 2017 claim was remanded. *See* AR 2689, 2692–93, 2696. The ALJ
13 wrote that his decision covered the period from the alleged onset date of June 27, 2017, to the
14 date last insured of December 31, 2022. AR 2699.

15 Although the ALJ did not explicitly reference the fact that this was a consolidated claim,
16 the record shows he had access to and considered the additional evidence in the record associated
17 with the November 2020 application. Even if the ALJ erred by not specifying that the decision
18 pertained to the consolidated applications filed in October 2017 and November 2020, Plaintiff
19 has not demonstrated that any error was harmful or that any aspect of her November 2020 claim
20 remains unresolved.

21 B. Medical Opinion Evidence

22 Plaintiff also contends the ALJ did not properly evaluate the medical opinion evidence in
23 the record. Dkt. 13 at 5. Specifically, she argues the ALJ erred in considering the opinions of
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1 Michael Regets, Ph.D.; Kristine Harrison, Psy.D.; David Coddington, Ph.D.; Michael Kelly,
2 M.D.; Kevin Lok, M.D.; and Shirley Deem, M.D. *Id.* at 7–11.

3 The regulations regarding the evaluation of medical opinion evidence have been amended
4 for claims filed on or after March 27, 2017. *See* Revisions to Rules Regarding the Evaluation of
5 Medical Evidence, 82 Fed. Reg. 5844, 5867–68, 5878–79 (Jan. 18, 2017). Because Plaintiff filed
6 her claim after that date, the new regulations apply. *See* 20 C.F.R. §§ 404.1520c, 416.920c.
7 Under the revised regulations, ALJs “will not defer or give any specific evidentiary weight,
8 including controlling weight, to any medical opinion(s) or prior administrative medical
9 finding(s). . . .” *Id.* §§ 404.1520c(a), 416.920c(a). Instead, ALJs must consider every medical
10 opinion or prior administrative medical finding in the record and evaluate the persuasiveness of
11 each one using specific factors. *Id.* §§ 404.1520c(a), 416.920c(a).

12 The two most important factors affecting an ALJ’s determination of persuasiveness are
13 the “supportability” and “consistency” of each opinion. *Id.* §§ 404.1520c(a), 416.920c(a).
14 “Supportability means the extent to which a medical source supports the medical opinion by
15 explaining the ‘relevant . . . objective medical evidence.’” *Woods v. Kijakazi*, 32 F.4th 785, 791–
16 92 (9th Cir. 2022) (quoting 20 C.F.R. § 404.1520c(c)(1)); *see also* 20 C.F.R. § 416.920c(c)(1).
17 An opinion is more “supportable,” and thus more persuasive, when the source provides more
18 relevant “objective medical evidence and supporting explanations” for their opinion. 20 C.F.R.
19 §§ 404.1520c(c)(1), 416.920c(c)(1). “Consistency means the extent to which a medical opinion
20 is ‘consistent . . . with the evidence from other medical sources and nonmedical sources in the
21 claim.’” *Woods*, 32 F.4th 785 at 792 (quoting 20 C.F.R. § 404.1520c(c)(2)); *see also* 20 C.F.R. §
22 416.920c(c)(2). ALJs must articulate “how [they] considered the supportability and consistency
23 factors for a medical source’s medical opinions” when making their decision. 20 C.F.R. §§
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1 404.1520c(b)(2), 416.920c(b)(2). “Even under the new regulations, an ALJ cannot reject an
2 examining or treating doctor’s opinion as unsupported or inconsistent without providing an
3 explanation supported by substantial evidence.” *Woods*, 32 F.4th at 792.

4 *1. Michael Regets, Ph.D., and Kristine Harrison, Psy.D.*

5 State agency psychological consultants Dr. Michael Regets and Dr. Kristine Harrison
6 provided mental RFC assessments at the reconsideration level for Plaintiff’s October 2017 and
7 November 2020 DIB applications, respectively. AR 110, 2781. The ALJ considered these two
8 opinions together in his decision. *See* AR 2694.

9 In September 2018, Dr. Regets found that Plaintiff had a moderate limitation in her
10 ability to understand and remember detailed instructions. AR 108. He explained that Plaintiff
11 retained the capacity to understand and remember simple, one to three step instructions, standard
12 work-like procedures, and regular work locations on a consistent basis in a competitive work
13 environment. AR 108–09. However, Dr. Regets found Plaintiff would not be able to consistently
14 understand and remember more detailed instructions. AR 109. Dr. Regets also found moderate
15 sustained concentration and persistence limitations, explaining that Plaintiff would have
16 intermittent interruptions of concentration, persistence, and pace due to interference of
17 psychological symptoms for up to two hours throughout a competitive workday. *Id.* He opined
18 that occasional supervisor instruction or redirection would help keep Plaintiff on task, and
19 Plaintiff was capable of concentrating throughout a competitive 40-hour work week. *Id.* Dr.
20 Regets also found moderate limitations in Plaintiff’s ability to interact appropriately with the
21 general public and to get along with coworkers or peers without distracting them or exhibiting
22 behavioral extremes. AR 109–10.

1 In May 2021, Dr. Harrison found a moderate limitation in Plaintiff's ability to
 2 concentrate, persist, or maintain pace, but no limitations in her ability to understand, remember,
 3 or apply information; adapt or manage herself; or interact with others. AR 2780. Dr. Harrison
 4 opined that Plaintiff was limited to simple, routine tasks, but was capable of frequent interaction
 5 with supervisors, coworkers, and the public. AR 2781, 2784. Dr. Harrison found moderate
 6 limitations in Plaintiff's ability to carry out detailed instructions, maintain attention and
 7 concentration for extended periods, and complete a normal workday and work week without
 8 interruptions from psychologically based symptoms and perform at a consistent pace without an
 9 unreasonable number and length of rest periods. AR 2784.

10 The ALJ concluded both Dr. Regets' and Dr. Harrison's findings were not persuasive
 11 because they were "neither supported by their summaries of the record noting normal mental
 12 status exams nor consistent with the record." AR 2694. The ALJ described the purportedly
 13 inconsistent evidence:

14 During mental status exams, the claimant's hygiene and grooming were adequate.
 15 She was calm with socially appropriate behavior. Her eye contact was socially
 16 appropriate. Rapport was readily developed. She was generally cooperative and
 17 interactive. Her memory was grossly intact. Her attention and concentration were
 18 adequate. Her judgment and insight were intact. There was no significant
 19 impulsivity impairment or major cognitive impairment.

20 *Id.* The ALJ also referenced Plaintiff's hearing testimony, noting that Plaintiff "testified that
 21 [she] does the administrative side of running the house: she pays the bills, keeps the scheduling,
 22 does paperwork, and supervises her husband for tasks that require more than 2 to 3 steps. She
 23 testified that she has not seen a mental health provider in a year." *Id.*

24 First, when describing the inconsistent evidence, the ALJ provided only general citations
 to two exhibits in the record that together covered over four and a half years of medical records
 and totaled 1,880 pages. *See id.* (citing AR 770–1655, 3121–4116). These broad references to the

1 record are not specific enough to allow the Court to determine whether the ALJ's findings are
2 supported by substantial evidence. Further, the ALJ does not explain the relevance of the
3 allegedly inconsistent mental status exam findings to Dr. Regets' and Dr. Harrison's opinions,
4 nor is the relevance of most of these findings apparent. Without further explanation, the brief
5 note that Plaintiff's "attention and concentration were adequate" during medical appointments
6 does not provide substantial evidence to support the ALJ's rejection of Dr. Regets' and Dr.
7 Harrison's opined concentration, persistence, and pace limitations in the workplace. Similarly,
8 the ALJ failed to explain how Plaintiff's testimony that she performs some household
9 administrative tasks and has not seen a mental health provider in a year conflicted with the
10 consultants' opinions.

11 Because of the lack of reasoning or specific reference to the record, the Court cannot
12 determine whether the ALJ's persuasiveness findings are supported by substantial evidence. *See*
13 *Blakes v. Barnhart*, 331 F.3d 565, 569 (7th Cir. 2003) ("We require the ALJ to build an accurate
14 and logical bridge from the evidence to [his] conclusions so that we may afford the claimant
15 meaningful review of the SSA's ultimate findings."). Accordingly, the ALJ erred. The error was
16 not harmless because, had the ALJ properly considered these opinions, the RFC may have
17 included additional limitations.

18 *2. Michael Kelly, M.D.*

19 In October 2017, Dr. Michael Kelly opined that Plaintiff's migraine headaches
20 permanently limited her ability to work because the noise, lights, and demands of a work
21 environment could worsen her migraines and she would be unable to concentrate due to pain. AR
22 739–42. The ALJ found Dr. Kelly's opinion not persuasive because it was "neither supported by
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1 this provider's records, which did not focus on the claimant's migraines, nor consistent with the
2 complete record." AR 2695.

3 In support of this finding, the ALJ cited to an October 2017 visit with Dr. Kelly for an
4 annual physical at which Plaintiff "brought in FMLA paperwork that was filled out yesterday to
5 be placed on an expected return to work date." *Id.* (citing AR 425–29). The ALJ noted that
6 Plaintiff's physical exam at this visit was grossly normal, and she was released the same day
7 without limitations. *Id.* The ALJ does not explain the relevance of this citation to his rejection of
8 Dr. Kelly's opinion. Plaintiff bringing paperwork to a routine medical visit and exhibiting
9 normal physical findings when she was not experiencing a migraine are not inconsistent with Dr.
10 Kelly's opinion regarding her impairments when she is experiencing a migraine.

11 The ALJ also noted that Plaintiff's "attention and concentration were adequate and there
12 was no evidence of a major cognitive impairment" during other mental status exams, citing to the
13 same voluminous exhibits that he provided when considering Dr. Regets' and Dr. Harrison's
14 opinions. *Id.* Again, these broad references to the record are not specific enough to allow the
15 Court to determine whether the ALJ's findings are supported by substantial evidence.

16 The ALJ next cited a December 2020 visit at which Plaintiff discussed with her
17 psychiatrist "being thankful that she had a medication which was effective" for her migraines. *Id.*
18 Not only did the ALJ provide this citation without explanation of its relevance, he also took this
19 quote badly out of context. The surrounding note from Plaintiff's mental health provider reads:

20 Patient indicates that she ran out of her migraine medication and had a couple of
21 bad episodes until she was able to get back on it. She now realizes that she will
22 probably need to take medication for the rest of her life. We discussed the
23 perspective of looking at it as "having to take the medication or being thankful that
24 she had a medication which was effective. [sic] The glass half empty versus half-
full ideas.

1 AR 4422. At the same visit, the provider noted Plaintiff was “dealing with severe migraine and
2 pain issues” and had been “experiencing [an] increase in number of migraines.” AR 4423. This
3 does not evidence inconsistency with Dr. Kelly’s opinion.

4 Finally, the ALJ cited to a September 2021 primary care provider note that listed a
5 “history of migraines currently managed with topiramate and sumatriptan” among Plaintiff’s
6 ongoing medical problems. AR 2695 (citing AR 4315). Although the ALJ again does not explain
7 the relevance of this citation to his rejection of Dr. Kelly’s opinion, he seems to assume that the
8 word “managed” in this note means “resolved.” There is no indication from this specific note
9 that Plaintiff no longer experiences migraines. Rather, the inclusion of “migraines” on the list of
10 Plaintiff’s ongoing problems and the note that Plaintiff was “to continue with sumatriptan for
11 abortive therapy” indicate that she was still experiencing migraines around that time. *See* AR
12 4315.

13 The explanations provided by the ALJ for finding Dr. Kelly’s opinion not persuasive are
14 either not supported by substantial evidence or insufficiently specific to allow the Court to
15 determine whether they are supported by substantial evidence. Accordingly, the ALJ erred. The
16 error was not harmless because, had the ALJ properly considered these opinions, the RFC may
17 have included additional limitations or the ultimate disability determination may have changed.
18 Therefore, reversal of the ALJ’s decision is required.

19 3. *Remaining Medical Opinion Evidence*

20 Plaintiff also challenges the ALJ’s evaluation of medical opinion evidence from David
21 Coddington, Ph.D.; Kevin Lok, M.D.; and Shirley Deem, M.D. Dkt. 13 at 8–12. Because the
22 Court finds reversible error in the ALJ’s evaluation of the other challenged medical opinion
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1 evidence and all medical opinion evidence must be re-evaluated on remand, it is not necessary to
2 address the ALJ's evaluation of the remaining opinion evidence.

3 C. Step Two and Step Three

4 Plaintiff contends the ALJ erred at Step Two and Step Three of the sequential evaluation
5 by failing to properly consider her skin lesions from hidradenitis suppurativa. *Id.* at 4. Because
6 Plaintiff may be able to present new evidence and testimony on remand and because the ALJ's
7 reconsideration of the evidence and testimony may impact the assessment of Plaintiff's
8 impairments, the ALJ shall also reconsider Plaintiff's skin lesions at Steps Two and Three.

9 D. Subjective Symptom Testimony

10 Plaintiff also argues the ALJ did not provide sufficient reasons for discounting her
11 testimony about the severity of her symptoms. *Id.* at 12–15. The Court concludes the ALJ
12 committed harmful error in assessing the medical opinion evidence and must re-evaluate all the
13 medical evidence on remand. Because Plaintiff may be able to present new evidence and new
14 testimony on remand and because the ALJ's reconsideration of the medical evidence may impact
15 the assessment of Plaintiff's subjective testimony, the ALJ must also reconsider Plaintiff's
16 testimony on remand.

17 E. Lay Witness Testimony

18 Finally, Plaintiff argues the ALJ erred in failing to properly consider six lay witness
19 statements in the record. *Id.* at 16–18. Under the revised regulations, ALJs are “not required to
20 articulate” how they evaluate evidence from nonmedical sources using the same factors
21 applicable to medical opinion evidence. 20 C.F.R. §§ 404.1520c(d), 416.920c(d)). The Ninth
22 Circuit has not yet clarified whether an ALJ is still required to provide “germane reasons” for
23 discounting lay witness testimony. *See Stephens v. Kijakazi*, No. 22-35998, 2023 WL 6937296,

1 at *2 (9th Cir. Oct. 20, 2023). Other relevant regulations indicate that ALJs will consider
2 evidence from nonmedical sources when evaluating a claim of disability. *See, e.g.*, 20 C.F.R. §§
3 404.1529(c)(1), 404.1545(a)(3), 416.929(c)(1), 416.945(a)(3). And an ALJ may not reject
4 “significant probative evidence” without explanation. *Vincent ex rel. Vincent v. Heckler*, 739
5 F.2d 1393, 1395 (9th Cir. 1984).

6 The Court has directed the ALJ to reassess the medical opinion evidence on remand. As
7 Plaintiff may be able to present new evidence and testimony on remand, and because the ALJ’s
8 reconsideration of the medical evidence may impact the assessment of the lay witness opinion,
9 the ALJ shall also reconsider the lay witness testimony on remand.

10 **IV. Conclusion**

11 Based on the foregoing reasons, the Court hereby finds that the ALJ improperly
12 concluded Plaintiff was not disabled beginning June 27, 2017. Accordingly, Defendant’s
13 decision to deny benefits is reversed and this matter is remanded for further administrative
14 proceedings in accordance with the findings contained herein.

15 Dated this 10th day of May, 2024.

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18 David W. Christel
19 United States Magistrate Judge
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